

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52****[EPA-R08-OAR-2022-0359; FRL-9886-01-R8]****Air Plan Approval; North Dakota; Removal of Exemptions to Visible Air Emissions Restrictions****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision it received on November 11, 2016, submitted by the State of North Dakota, through the North Dakota Department of Health (NDDH). The revision was submitted by North Dakota in response to a finding of substantial inadequacy and SIP call published on June 12, 2015, for a provision in the North Dakota SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing approval of the SIP revision and proposing to determine that this SIP revision corrects the deficiency identified in the June 12, 2015, SIP call.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2022-0359 at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied

by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Ellen Schmitt, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, telephone number: (303) 312-6728, email address: schmitt.ellen@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we” or “our” is used, it refers to EPA.

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I. Background

On February 22, 2013, EPA issued a *Federal Register* notice of proposed rulemaking outlining EPA’s policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the Clean Air Act (CAA) with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5).

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. In the 2015 SSM Action, EPA issued a SIP call for the North Dakota SIP, since EPA found that provision 33-15-03-04.3, located in the State’s SIP, is inconsistent with the CAA and the 2015 SSM Policy because it allows for discretionary exemptions from otherwise applicable emission limitations through a State official’s unilateral exercise of discretionary authority that is insufficiently bounded. As noted in a previous footnote, shortly after North Dakota proposed the November 11, 2016 SIP revision, the State created a new environmental agency, the North Dakota Department of Environmental Quality (NDDEQ), and North Dakota’s Air Pollution rules were recodified under the NDAC as 33.1-15 instead of 33-15.² Therefore, from here on in this document, EPA will refer to provision 33-15-03.04.3 as 33.1-15.03-04.3.

² In 2017, the North Dakota State legislature created the NDDEQ that assumed all the duties and responsibilities of the NDDH’s Environmental Health Section. To accommodate the new NDDEQ, the North Dakota Air Pollution Control Law was recodified in the North Dakota Century Code (NDCC) as NDCC 23.1-06 and the Air Pollution Rules were recodified in the North Dakota Administrative Code (NDAC) as NDAC 33.1-15.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.³ Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific State SIP provisions that were substantially inadequate to meet the requirements of the Act.”

Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to North Dakota in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA’s Deputy Administrator withdrew the 2020 Memorandum and announced EPA’s return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).⁴ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.⁵ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA’s plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA’s intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including North Dakota’s November 11, 2016 SIP submittal provided in response to the 2015 SIP call.

³ October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

⁴ September 30, 2021, memorandum “Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,” from Janet McCabe, Deputy Administrator.

⁵ 80 FR 33985.

With regard to the North Dakota SIP, EPA proposes to approve the removal of provision 33.1-15-03-04.3 from Article 33.1-15-03, Restriction of Emission of Visible Air Contaminants.⁶ This provision was among those that EPA determined were inconsistent with the CAA in the 2015 SSM SIP Action. Provision 33.1-15-03-04.3 stated that the otherwise applicable emission limitations for opacity in several other listed regulations do not apply “where an applicable opacity standard is established for a specific source.” In the 2015 SSM SIP Action, EPA determined that this provision allowed a State official to modify the opacity limits in a permit or other document to allow emissions in excess of the otherwise applicable SIP limitations. The detailed rationale for issuing the SIP call to North Dakota can be found in the 2015 SSM SIP Action. In its November 11, 2016 SIP submission, North Dakota is requesting that EPA revise the North Dakota SIP by removing 33.1-15-03-04.3 in its entirety, thereby removing this provision from the State’s SIP.

II. Analysis of SIP Submission

EPA is proposing to approve North Dakota’s November 11, 2016 SIP revision requesting the removal of provision 33.1-15-03-04.3 from the State’s SIP. We consider the removal of this provision sufficient to correct the inadequacies that EPA’s 2015 SSM SIP Action identified in the North Dakota SIP.⁷ As a result of the removal from the SIP, the impermissible discretionary exemptions from emissions limitations contained within this provision will no longer be available to sources. As explained in the 2015 SSM SIP Action (80 FR at 33848), the removal of an exemption is an appropriate way to address the inadequacy. EPA’s proposed approval of this revision is consistent with CAA section 110(l) because approval will not interfere with any applicable requirement of the CAA. Specifically, by removing the discretionary exemptions created by 33.1-15-03-04.3, the SIP is now more protective. Therefore, we are proposing to

⁶ The North Dakota State Health Council adopted the amendments removing provision 33-15-03-0.3 on February 24, 2016 (effective July 1, 2016).

⁷ For a more in-depth discussion on the inadequacies of 33-15-03-04.3, see our proposed 2015 SSM SIP Action, 78 FR 12459, 12531-32.

approve the removal of this provision from the SIP. Because removal of this provision would fully address the inadequacies that the 2015 SSM SIP Action identified in the North Dakota SIP, this proposed action, if finalized, will satisfy North Dakota's obligations pursuant to EPA's 2015 SSM SIP Action.

III. Proposed Action

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). EPA is proposing to approve North Dakota's November 11, 2016 SIP submission requesting removal of 33.1-15-03-04.3 from the State SIP. We are proposing approval of the SIP revision because we have determined that it is consistent with the requirements for SIP provisions under the CAA. EPA is further proposing to determine that such SIP revision corrects the deficiency identified in the June 12, 2015, SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this SIP revision is consistent with CAA requirements and whether it addresses the substantial inadequacy in the specific North Dakota SIP provision (33.1-15-03-04.3) identified in the 2015 SSM SIP Action. EPA has previously taken action on other parts of the North Dakota November 11, 2016 SIP submittal and therefore these other elements have not been addressed in this action nor will EPA be taking comments on those topics at this time.⁸

IV. Incorporation by Reference

In this document, EPA is proposing to remove in a final rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to remove the incorporation by reference of "33.1-15-03-04.3" in 40 CFR 52.1820, as described in Section II of this preamble. EPA has made, and will continue to make, these documents generally available through <https://www.regulations.gov> and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of

⁸ See 83 FR 22227, May 14, 2018 (proposed rule) and 84 FR 11646, March 28, 2019 (final rule).

this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves removal of State law not meeting Federal requirements and does not impose additional requirements beyond those already imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 24, 2022.

KC Becker,
Regional Administrator,
Region 8.

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